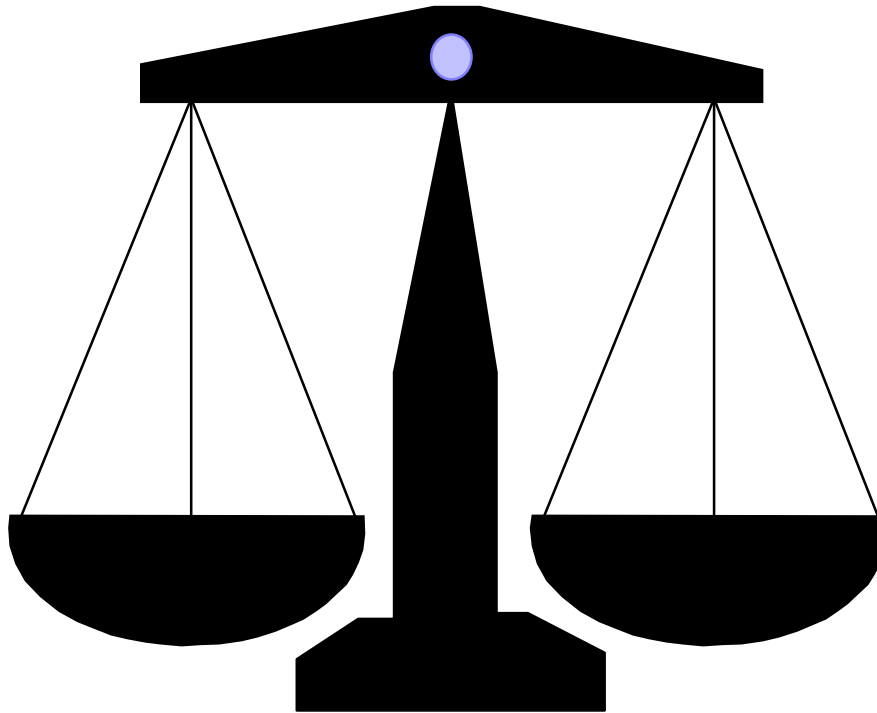


The Issue of Statutory Construction and the Harmonious  
Application of Terms:

Distinguishing *Glinton v. And R, Inc.*, 524 S.E.2d 481 (Ga.  
1999), from Indiana Law.



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**Issue: Whether the decision of the Georgia Supreme Court regarding the application of criminal usury statutes has any effect on the Indiana Attorney General's Opinion regarding Indiana's criminal usury statute as it applies to payday loans.**

**Answer: No.**

The Supreme Court of Georgia answered the follow questions certified to it by the 11<sup>th</sup> Circuit Court of Appeals:

1. Can Georgia's statutory scheme regulating pawnbrokers be read harmoniously with the criminal usury statute (OCGA §7-4-18) so that both apply to "pawn transactions" as defined (OCGA §44-12-130(3)) or are they meant to be governed exclusively by the pawnbroker statute (OCGA §44-12-130, 131)?
2. Is the permissible rate of interest and fees charged in "pawn transactions" as defined (OCGA §44-12-130(3)) governed solely by the pawnbroker statute (OCGA §44-12-131) or does the criminal usury statute (OCGA §7-4-18) apply, resulting in a lesser amount of allowable charges with any excess representing a violation of Georgia law?<sup>1</sup>

In answering these questions the Court proceeded through the following steps:

1. Nothing in the pawnshop statute indicated that the criminal ceiling of 5% per month applied.
2. The pawnshop statute was enacted long after the criminal usury statute and was more specific; thus, it governed pawn transactions.
3. A criminal statute is construed strictly against liability. The interpretation most favorable to the party facing criminal liability must be adopted.
4. On its face, the pawnshop statute permits finance charges exceeding 5% per month.
5. If the legislature intended to cap pawnshop rates it could have done so explicitly.
6. When there is conflict between statutes, later ones prevail over earlier and more specific prevail over general.

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<sup>1</sup> *Glinton v. And R, Inc.*, 524 S.E.2d 481, 482 (Ga. 1999).

The Court concluded that the pawnshop statute takes precedence over pawn transactions under Georgia law by using these findings. Under the same analysis, however, Indiana law regarding payday loans comes to a different conclusion.

## 1. Indication of statute.

Where the Georgia pawnshop statute apparently indicates that it is the sole governing voice on interest in pawn transactions, the statute under which payday lenders operate in Indiana is only a subsection which must be viewed in concert with the rest of that particular section. Georgia, however, has an entire statutory framework dealing with pawn transactions. As the Court stated, "The plain language of the statute addresses interest and pawnshop fees..."<sup>2</sup>

In contrast, Indiana licenses payday lenders under the Uniform Consumer Credit Code (UCCC). The statute in question deals with consumer lending in a more general sense.<sup>3</sup> IC 24-4.5-3-508(7) permits a minimum loan finance charge of thirty-three dollars with respect to a consumer loan not made pursuant to a revolving loan account. This subsection does not stand alone, but must be taken as a whole with the rest of Section 508. As stated in IC 24-4.5-3-508(1), "With respect to a supervised loan...a supervised lender may contract for and receive a loan finance charge not exceeding that permitted by this section." Subsection (3) further states, "This section does not limit or restrict the manner of contracting for the loan finance charge...so long as the rate of the loan finance charge does not exceed that permitted by this section." The maximum allowable Annual Percentage Rate (APR) is set at thirty-six percent by this section.<sup>4</sup> This seems to conflict with the allowable finance charge of not more than thirty-three dollars, where that charge would result in an APR above thirty-six percent.

These subsections must be harmonized to give full force and effect to both, if possible, under Indiana law.<sup>5</sup> Harmonization produces a reading that the thirty-three dollar finance charge is allowed **so long as** it does not result in an APR exceeding the thirty-six percent limit set by the General Assembly. This reading is further supported

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<sup>2</sup> *Id.*, at 866.

<sup>3</sup> IC 24-4.5-3-508.

<sup>4</sup> IC 24-4.5-3-508(2).

<sup>5</sup> *Ross v. Chambers*, 14 N.E.2d 1012 (Ind. 1938).

by the legislative notes from the amendment of subsection (7) in 1994 when the phrase "notwithstanding subsection(2)" was deleted before its passage.<sup>6</sup> If this phrase was still included in subsection(7) it would definitively demonstrate that the thirty-three dollar charge is allowed regardless of any other subsection or statute. However, the removal of the phrase eliminates any possibility that subsection(7) grants an exemption to the rate limits set out in §508, much less those in the criminal usury statute<sup>7</sup>.

It is well within the power of the General Assembly to grant such an exemption. A telling example is the exemption given to Indiana pawnbrokers in IC 28-7-5-28.5<sup>8</sup> Had the legislature intended payday loans to be exempt from interest rate ceilings it would have said so by leaving the phrase "notwithstanding subsection (2)"<sup>9</sup> in place when IC 24-4.5-3-508 was amended in 1994.

The clear implication is that the General Assembly knew full well that conflict could arise between these two subsections yet decided to keep the interest rate limits rather than exempt the finance charge from them. Unlike Georgia's pawnshop statute, not to mention Indiana's, there is plenty of indication that interest rates associated with supervised loans are to be limited by §508 in all cases and by the criminal usury statute in the most egregious ones.

## **2. Specificity of statute.**

The Georgia Court also found that since the pawnshop statute was enacted long after the criminal usury statute and was more specific, it governed pawn transactions exclusively. This differs from the state of affairs in Indiana concerning payday lenders. While pawnbrokers have an historical background in consumer lending, payday loans are a new phenomenon that did not enter Indiana until 1994 - at least two years after the amendment of the statute under which payday lenders operate. As such, it flies in the face of reason to suggest that the General Assembly was specifically referring to these transactions when the statute was amended. Payday lenders evolved in Indiana by utilizing a statute that was not drafted with them in mind.

Furthermore, a plain reading of the two statutes shows that the criminal usury statute in Indiana is in fact the more specific of the two. The rate ceiling in IC 35-45-7-

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<sup>6</sup> P.L.122-1994, Sec. 27.

<sup>7</sup> IC 35-45-7-2.

<sup>8</sup> "...a pawnbroker may charge...and receive a fee.... Such a charge when made and collected is not interest and is not a rate under IC 34-45-7-1."

<sup>9</sup> IC 24-4.5-3-508(2) states that the loan finance charge may not exceed thirty-six percent per year.

2, the criminal usury statute, originates in a particular subsection that sets a ceiling for interest rates on consumer loans<sup>10</sup> without any exception for the minimum loan finance charge. The relationship between these two statutes is readily apparent. The criminal usury rate is set at twice the consumer loan interest rate ceiling. If the consumer rate ceiling changes, the criminal ceiling changes. This is much more than a passive tie between two statutes. They are actively related to each other and thus **have** to be read together to avoid an absurdity within the Indiana Code. The subsection providing for a minimum loan finance charge<sup>11</sup> contains no other language that would imply this charge is allowed **notwithstanding any other provisions of the UCCC**, or even of Indiana's Criminal Code.

### 3. Construction of criminal statute.

The Georgia Court first noted that OCGA §7-4-18 is a criminal statute and should be construed strictly against criminal liability. If there is more than one reasonable interpretation, then that most favorable to the party facing criminal liability must be adopted.<sup>12</sup> Keeping this rule in mind, the pawnshop and criminal usury statutes were examined to determine whether or not they could be read harmoniously.<sup>13</sup> By concluding that they could not, the Court found that when it comes to pawn transactions the criminal usury statute is inapplicable.<sup>14</sup>

If an Indiana court must make this determination the case law suggests that the ruling will be more in line with the dissent in *Glinton*. As the dissent opines in part, "[F]ulfillment of that appellate duty by going beyond apparent facial inconsistency and performing a penetrating analysis results in a reasonable interpretation which harmonizes the two statutes at issue in this case..."<sup>15</sup> As the dissent continues to state, the two statutes in question are not conflicting, but can be harmonized together. The same is true of Indiana's consumer loan transaction and criminal usury statutes. Reading the two together leads to the conclusion that lenders can levy a finance charge up to thirty-three dollars **so long as this amount does not exceed the interest limits set out in**

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<sup>10</sup> IC 24-4.5-3-508(2)(a).

<sup>11</sup> IC 24-4.5-3-508(7).

<sup>12</sup> *Glinton*, 524 S.E.2d 481.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*, at 867, *Benham, C.J., dissenting*.

**earlier subsections.** Furthermore, if the levying of this charge leads to an interest rate in excess of that set out in the criminal usury statute, the entire transaction is void **as a matter of law.**

#### **4. Plain meaning of statute.**

The Georgia Court stated that the plain language of the pawnshop statute addresses interest and pawnshop fees in the aggregate.<sup>16</sup> This means that, on its face, the statute refers to any combination of interest and pawn charges for the first 90 days of the transaction. In Indiana, however, the plain language of the supervised lender statute supports an entirely different interpretation.

Following the subsections sequentially is a logical way to arrive at the plain meaning of this statute. As stated in IC 24-4.5-3-508(1), "With respect to a supervised loan...a supervised lender may contract for and receive a loan finance charge not exceeding that permitted by this section." Subsection(2) then sets out the limits, **in Annual Percentage Rates**, which may not be exceeded. The established rate ceiling is thirty-six percent where payday loans are concerned. Subsection (3) then states, "This section does not limit or restrict the manner of contracting for the loan finance charge...so long as the rate of the loan finance charge does not exceed that permitted by this section."<sup>17</sup> Subsection(4) mandates that the term of a loan commences on the date the loan is made. Subsection(5) once again refers to Subsection(2) as setting a ceiling which can not be exceeded by interest rates for consumer loans. Subsection(6) allows for the adjustment of certain **dollar amounts** in this section according to the Consumer Price Index (CPI). Finally, subsection(7) authorizes a minimum loan finance charge of not more than thirty-three dollars.

The use of the word "rate" throughout §508 clearly evinces a determination by the General Assembly that the dollar amount of a loan finance charge has no bearing on the regulation of supervised loans. Rather, the resulting interest rates are not to exceed those permitted in this section of the UCCC.<sup>18</sup> The first subsection plainly states that a lender **may not contract for a finance charge not permitted by this section.** The statute then states unequivocally that the APR of this charge may not exceed,

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<sup>16</sup> *Id.*, at 866.

<sup>17</sup> IC 24-4.5-3-508(3).

<sup>18</sup> IC 24-4.5-3-508.

in the case of payday loans, thirty-six percent. The next subsection once again refers to the **"rate of the loan finance charge"**<sup>19</sup> which may not be exceeded.

There is a clear delineation between interest rates and dollar amounts. Where dollar amounts may change, depending on the CPI, every two years, the interest rates are set in stone. Every condition that must be met by lenders operating under §508 springs from an initial statement that lenders may not contract for and receive a finance charge exceeding that permitted by this section.<sup>20</sup> Furthermore, the criminal usury statute<sup>21</sup>, by using §508(2) as its starting point, plainly indicates that there is no exception contained in §508 allowing the criminal usury limits on interest rates to be exceeded. A plain reading of the statute fully supports the view that subsection(7) does not carve out its own exemption for the thirty-three dollar finance charge. Instead, **it allows the charge only so long as the rate ceilings, which are set out previously as a mandatory condition for any loan finance charge, are not exceeded.**

##### **5. Legislative intent in enacting statute.**

In its findings, the Georgia Court stated, "Had the legislature intended to cap pawnshop transaction interest at five percent per month or less, it could have done so."<sup>22</sup> Using this reasoning the court held that the legislature never intended for pawnshops to be governed by the criminal usury statute.

By the same token, had Indiana's General Assembly intended to exempt payday loans from the reach of the criminal usury statute it could have done so. This is precisely what took place with pawnshops in Indiana. Indiana's pawnshops are specifically exempted from the criminal usury statute<sup>23</sup>, unlike supervised lenders such as payday lenders. At the very least this implies that had the legislature intended payday loans to be exempt from the same definition then it would have said so in certain terms. The criminal usury statute must apply to payday loans unless the legislature states otherwise as they have done for pawnbrokers. A statement of such intent has not been made by the General Assembly to date.

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<sup>19</sup> IC 24-4.5-3-508(3).

<sup>20</sup> IC 24-4.5-3-508(1).

<sup>21</sup> IC 35-45-7-2.

<sup>22</sup> *Glinton*, at 866.

<sup>23</sup> IC 28-7-5-28.5.

## 6. Conflict between statutes.

The most important factor here is that the Georgia Supreme Court found that the pawnshop statute and the criminal usury statute are in conflict. As a result, it applied the rule of statutory construction that later statutes prevail over earlier ones.<sup>24</sup> Since the pawnshop statute was enacted long after the criminal usury statute, and was found to be more specific, it governs pawn transactions.

The dissent disagreed with the assertion that these two statutes were in conflict, stating that they could be read together to accomplish the intent of the legislature in enacting both statutes.<sup>25</sup> This view more accurately reflects the state of the law in Indiana.

It is well settled that when two statutes apply to the same subject they must be construed in harmony if possible. This is to be applied before any other rules of statutory construction.<sup>26</sup> In the case of two statutes that apply to the same subject matter the court attempts to give full effect to both statutes.<sup>27</sup> Harmonious construction is necessary to the ideal of a general and uniform system of jurisprudence.

Indiana's General Assembly specifically acknowledges the consumer loan ceiling for the purpose of establishing a criminal act known as loansharking. One must conclude, by such specific acknowledgement of the type of rate to be used in determining a criminal act, that the General Assembly did not intend for the finance charge to operate as an exception. The thirty-three dollar finance charge for consumer loans is authorized only if it does not exceed an APR of thirty-six percent. Additionally, any charge that has an APR over seventy-two percent is proscribed as a felonious act.

§508 does not allow payday lenders to levy a loan finance charge regardless of whether or not the resulting APR is over the thirty-six percent limit set out in subsection(2). It would be complete and utter folly to believe that the same is not true for the higher bar established in the separate criminal statute.<sup>28</sup> These are two, separate provisions of the Indiana Code dealing with

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<sup>24</sup> *Glinton*, at 866.

<sup>25</sup> *Id.*, at 867, *Benham, C.J., dissenting*.

<sup>26</sup> *Marion County Sheriff's Merit Bd. v. Peoples Broadcasting Corp.*, 547 N.E.2d 235, 237 (Ind. 1989), citing *Schrenker v. Clifford*, 387 N.E.2d 59 (Ind. 1979).

<sup>27</sup> *Board of Trustees of Indiana Public Employees' Retirement Fund v. Grannan*, 578 N.E.2d 371 (Ind.App. 4 Dist. 1991).

<sup>28</sup> IC 35-45-7-2.

the same subject matter. Furthermore, **both originate from the same source - a limit on interest rates set by the General Assembly.** As such, both statutes should be construed in harmony with full force and effect given to each.<sup>29</sup> To do otherwise would be to frustrate the clear intentions of the General Assembly in enacting a statute to protect consumers from usurious interest rates. A plain reading of the statutes combined with Indiana case law concerning statutory construction mitigates against such a result.

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<sup>29</sup> Ross, 14 N.E.2d 1012 (Ind. 1938).